

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN L. NORRIS,

Defendant-Appellant.

UNPUBLISHED

August 25, 2009

No. 284566

Wayne Circuit Court

LC No. 07-020805-FC

Before: Cavanagh, P.J., and Markey and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(i), obstruction of justice, MCL 750.505a, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 20 to 50 years for each CSC conviction, 10 to 50 years for the obstruction conviction, 5 to 50 years for the felon in possession conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I. Basic Facts

In February 2007, the 13-year-old victim had a conversation with defendant, her mother's live-in boyfriend, about a boy she liked, and they hugged during the conversation. The victim testified that defendant came to her room that night, removed her clothing, and inserted his penis in her vagina; he used his hands to widen her vagina in order to further penetrate her. The victim further testified that in July 2007, defendant woke her and directed her to a hallway, where they kissed and engaged in sexual intercourse, cunnilingus, and fellatio. Defendant told the victim that he loved her, and also cautioned her to be quiet so she would not wake her mother. The victim testified that on August 22, 2007, at about 2:00 a.m., she was leaving the bathroom and saw defendant, who was naked. Defendant took her in a hallway, removed her clothing, and engaged in sexual intercourse with her. The victim's mother testified that she had been sleeping in the living room, got up to use the bathroom, turned on a light, and saw defendant engaging in sexual intercourse with the victim. The victim went to her room, defendant and the victim's mother struggled and argued, and defendant announced that he was leaving.

The victim's mother testified that she subsequently heard the clicking of a gun, saw defendant holding a gun to his stomach, and heard defendant say that he should kill himself. Defendant then walked to the side door and fired three or four gunshots into the air. Defendant returned, apologized to the victim's mother, and said that someone had to "do it" with the victim, but denied actually penetrating the victim's vagina. The victim's mother indicated that from about 2:00 a.m. until 6:00 a.m., she sat in the living room with defendant, who was still naked and armed with a gun. At 6:00 a.m., defendant directed her to accompany him to his aunt's house, and she complied because she was afraid. En route, defendant again apologized and explained that he had to have sex with the victim to prevent her from engaging in sex with someone else. At this point, defendant's gun was holstered at his waist. They remained at the aunt's house until 3:00 p.m. The victim's mother explained that defendant sent her out for food, but she did not contact the police because of her fear of defendant. After returning home, the victim's mother slept until the next day. That morning, defendant left the house with the victim's mother's sons, brought them back about an hour later, and left. The victim's mother explained that when she was sure that defendant was gone, she went to the police station to report the sexual assault; she did not take the victim because she did not think that she would cooperate.

The police questioned the victim, who denied having sex with defendant, and arrested defendant on firearm charges. When the victim's mother returned home, the victim was not there. The next day or so, the victim's mother reported her missing and the police located her with defendant's brother. During a subsequent medical examination, the victim admitted to hospital personnel that she had sex with defendant. Days later, in a Kids Talk interview, the victim denied having sex with defendant. At trial, the victim testified that she lied because she did not want defendant to get into trouble. The victim's mother testified that after defendant was released on bond, he called her several times, some of which she recorded. During the calls, defendant attempted to scare the victim's mother, cautioned her to refrain from going to court, and offered her money.

The defense denied any wrongdoing. The defense argued that the victim's mother fabricated the charges to remove defendant from their home in order to steal his property, and also because she was upset that he had a wife and other girlfriends. On cross-examination, the victim's mother testified that after defendant's arrest, she took marital property from their home, although she acknowledged that there was no marital record for her and defendant. The defense also argued that the victim had repeatedly denied the allegations and, during defendant's initial incarceration for the firearm charges, the victim's mother intimidated the victim and caused her to change her statement. The defense presented defendant's current girlfriend, who testified that defendant was not married to the victim's mother, and that on August 23, 2007, between 9:00 and 11:00 a.m., she was with defendant. Defendant's sister-in-law also testified that defendant was married to another woman, and that the victim's mother was aware of defendant's marriage.

II. Other Acts Evidence

Defendant argues that his convictions should be reversed because evidence concerning acts of domestic violence against the victim's mother was improperly admitted, contrary to MRE 404(b)(1). We disagree.

Initially, we disagree with defendant's statement that he preserved this issue with an appropriate objection below. On appeal, defendant challenges three portions of the victim's mother's testimony. Defendant objected to the first portion below on the ground that the testimony was irrelevant and more prejudicial than probative. The trial court overruled that objection. Regarding the second portion of testimony challenged on appeal, defendant objected below and asked to approach the bench, but no record was made. Defendant did not object to the third portion of testimony that he now challenges on appeal. The record does not indicate that defendant objected to any of the challenged testimony on the basis of MRE 404(b), or complained about a lack of notice under MRE 404(b)(2). An objection on one ground is insufficient to preserve an appellate challenge based on a different ground. *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003). Accordingly, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

During the prosecutor's direct examination of the victim's mother, the following exchanges occurred:

Q. Between the time that you - - between 2:00 and 6:00 a.m. do you ever call the police?

A. No.

Q. Why not?

A. Too afraid to call the police.

Q. What were you afraid of?

A. Him.

Q. Why were you afraid of him?

A. He had the gun. *He already had beaten me before prior to these - - to this day. We had had fights and everything, so I already knew not to call the police on him.*

* * *

Q. At some point you mention that the defendant sent you [from his aunt's house] to do some errands?

A. Yes.

* * *

Q. Was anyone with you when you went to pick up the food?

A. No.

Q. At this point do you notify the police of what you'd seen the night before?

A. No.

Q. Why don't you notify the police of what you saw?

A. I know he was just timing me.

* * *

Q. And why was it important that he's timing you?

A. Because *prior to him jumping on me - - he used to jump on me a lot. So in between those beatings it was times he would [l]et me go just to see if I would call the police.*

Defense counsel: Judge, objection. May we approach.

The court: Sure.

(Side bar held)

Q. Okay. We left off, you didn't call the police when you went to get the food, right?

A. No.

Q. And you gave us a reason for that?

A. Yes.

* * *

Q. During this time that you went to sleep did you ever call the police?

A. No.

Q. Why not?

A. Once again, *I [sic] been afraid of him for years.* [emphasis added]

MRE 404(b)(1) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime. See also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). But other acts evidence is admissible under MRE 404(b)(1) if it is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at

trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403.¹ *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). In application, the admissibility of evidence under MRE 404(b)(1) necessarily hinges on the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted. *Id.* at 75.

Here, the evidence was not offered to show that defendant had a bad character. Rather, its purpose was to explain why the victim's mother did not immediately go to the police and it assisted the jury in weighing the victim's and her mother's credibility, particularly where defendant denied having a sexual relationship with the victim and asserted that her mother's delayed reporting of the sexual abuse of her daughter substantiated his assertion of fabrication. Evidence of a defendant's prior bad acts is relevant to explain a delay in reporting alleged abuse. See *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996). Here, defendant's primary theory of defense was that the victim's mother fabricated the charges against him to have him jailed so that she could freely steal his property from the home. In arguing that the victim's mother was not credible, the defense noted that even though she witnessed her young daughter being sexually assaulted, she did not report it for three days. The evidence concerning defendant's prior conduct toward the victim's mother and her resultant fear of him was relevant to explain why she did not immediately report the assault and actually stayed with defendant for a period of time. Because the evidence was probative of the victim's mother credibility, which was a central issue in this case, it was relevant. Moreover, defendant has not demonstrated that he was unfairly prejudiced by the evidence. See MRE 403. Consequently, defendant is not entitled to appellate relief.

III. Prosecutor's Conduct

Defendant also argues that he is entitled to a new trial because the prosecutor engaged in impermissible conduct. We disagree. Because defendant failed to object to the prosecutor's conduct below, we review his unpreserved claims for plain error affecting substantial rights. *Carines, supra*. This Court will not reverse if the alleged prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant argues that the prosecutor improperly stated during closing argument that she knew "the truth," and continued the impermissible remarks by vouching for the victim in rebuttal argument. Specifically, the prosecutor stated:

When I first talked to you on Thursday morning I told you that truth is stranger than fiction sometimes. And in this case the things that you've heard may seem strange. But *the truth* in this case is one that is sad and disturbing,

¹ Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The relevancy "threshold is minimal: 'any' tendency is sufficient probative force." *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998).

because this defendant, John Norris, took advantage of [the victim], his stepdaughter for all purposes. Took advantage of the love that she was seeking, the comfort that she was seeking, and he took advantage of the trust that she had in him, and that her mother had placed with them by allowing them to stay in the house.

The Judge then told you, the Judge will tell you again, and I'll remind you, that your job as jurors is that you are the judges of the facts. You get to decide when you begin to deliberate what actually occurred back on August 22nd, August 23rd, and then again from that time frame, from where this started in January, February, of 2007 up until August. You get to decide ultimately whether the witnesses were truthful, whether the testimony presented is one that makes sense. But it's your job to decide the facts of this case. And in doing so it's your job to not only decide the facts in this case, but to decide if I've proven the case, proven the charges that this defendant is charged with beyond a reasonable doubt.

* * *

Now I would like to start out by saying that the defense attorney is, wants you to believe that [the victim] is lying and she is making all this up.

But *if she was really going to lie*, you heard what she said, if she is really lying she would make it more damaging. If someone is going to make it up, they are really going to come up with a really damaging story. That the Defendant came into her bedroom, threatened her not to tell anybody. That he held her down. That he called her a whore, etcetera. You can think of tons of things that she could say to make it more damaging.

* * *

What makes sense, ladies and gentlemen, is that [the victim] followed the orders that he told her. If you get caught, lie. She had just seen him taken away in a police car. She goes to the police department and denies that anything happened. The police department isn't going to take her to the hospital then and force her to undergo an exam. She tells them it didn't happen. When she goes to Kids Talk . . . she admitted to you - - remember I asked her; did they ask you that question if anything happened on the 22nd, and didn't you ask them, is he going to get in trouble? Wasn't that your first question to most of the questions they asked you? And she said yeah. She didn't want this defendant to get in trouble. She still doesn't want this defendant to get in trouble.

What makes most sense is not that [the victim's mother or the victim] concocted this lie, but that the defendant got caught taking advantage of thirteen year old [victim]. That defendant got caught doing the unthinkable to [the victim]. That [the victim] cared for him and tried to do everything she could to protect him. But finally when she was under oath two times *she told you the truth*. She came clean about why she lied. [emphasis added.]

A prosecutor may not vouch for the credibility of a witness by conveying that she has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Viewed in context, the challenged remarks did not suggest that the prosecutor had special knowledge that the victim was credible. Rather, the prosecutor's argument was focused on refuting defense counsel's assertions during trial and closing argument that the victim fabricated the charges against defendant, and that her testimony was inconsistent and not credible. In making the challenged remarks, the prosecutor urged the jury to evaluate the evidence, discussed the consistency of the victim's testimony, and argued that there were reasons from the evidence to conclude that she was credible. A prosecutor is free to argue from the facts that a witness is credible. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996); *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). In addition, in its final instructions, the trial court instructed the jurors that they were the sole judges of witness credibility and that the lawyers' statements and arguments are not evidence. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

Defendant further argues that the prosecutor impermissibly commented on his alibi witness's credibility when she made the following emphasized remarks during closing argument:

I'm only going to talk very briefly, because I think you all have common sense and you can evaluate the witnesses themselves. But there's no doubt in my mind that those two witnesses that you saw today, came in here and *lied to help this defendant*.

The first witness, his now girlfriend, comes in and tells you almost five or six months after the defendant is charged with a crime that she was with him that day. That's an alibi, ladies and gentlemen. And she knew that he was facing these charges, and she chose to keep that to her breast, keep that to herself, only share it with the lawyers, and never do anything to try to help her boyfriend with his legal problem that he has. That to you, ladies and gentlemen, her motive is clear. She lives in the house with him. She loves with [sic] him. She wants to build a life with him. And I submit to you *that testimony was not truthful*. [emphasis added.]

The prosecutor's remarks conveyed her contention that, based on the evidence, any defense based on defendant's girlfriend's testimony was suspect, and not credible. When making the challenged remarks, the prosecutor asked the jury to evaluate the witness's testimony and to consider her lengthy delay in reporting the alibi, as well as her motives for lying. A prosecutor is free to argue reasonable inferences from the evidence as they relate to her theory of the case, including that a witness is not worthy of belief, *Fisher, supra*, and the prosecutor is not required to phrase her arguments and inferences in the blandest possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Thus, the prosecutor's remarks were not improper.

Defendant also claims that the prosecutor improperly denigrated defense counsel when she made the following emphasized remarks during rebuttal argument:

Further, [defense counsel] twice, during [the victim's] testimony – and I don't think it's a stretch to say *he misled you*. He tried to get there to get up here and say you lied over in court [during her preliminary examination] under oath, didn't you. And he'd ask her two very very small questions. Wouldn't want to go on farther past that. Then when I got up there and asked her, yeah, I clarified it with my next question and my next question. So the idea that she wasn't truthful over at court is not something he can even suggest to you. Because she told you what she said at court.

* * *

The defendant's own words, his own words in this transcript, contradict *that lie that [defense counsel] is trying to sell you*. His own words. [emphasis added.]

A prosecutor may not personally attack the credibility of defense counsel, or suggest that defense counsel is intentionally attempting to mislead the jury. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996); *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). The jury's focus must remain on the evidence, and not be shifted to the attorneys' personalities. See *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996).

Even if the prosecutor's remarks were improper, defendant did not object and has not demonstrated that any error affected his substantial rights. *Carines, supra*. The prosecutor's two brief, isolated remarks were focused on refuting defendant's claim that the victim's trial testimony was inconsistent with her preliminary testimony, and expressed her contention that defense counsel's suggestion ignored the evidence. Although the prosecutor made remarks directed at defense counsel, the crux of the argument dealt with the testimony and, therefore, the jury's focus remained on the evidence. Further, defendant's right to a fair trial was protected by the court's instructions that the lawyers' statements and arguments are not evidence that the jury was to decide the case based only on the properly admitted evidence, and that it was to follow the court's instructions. *Long, supra*. Consequently, this unpreserved claim does not warrant reversal.

We also reject defendant's related argument that he was denied the effective assistance of counsel because defense counsel failed to object to the prosecutor's remarks. Because the trial court's instructions adequately protected defendant's rights, defendant cannot demonstrate a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Alton T. Davis